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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
McFARLAND WRECKING CORPORATION

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No.86-159

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a notice and order of civil penalty for \$1,000 for purportedly unauthorized and unsafe removal of asbestos from an old warehouse located in Seattle came on for hearing before the Board on January 9, 1987, at Lacey, Washington. Seated for and as the Board were; Lawrence J. Faulk, Chairman, Wick Dufford, and Judith A. Bendor, members. Pursuant to Chapter 43.21B.230 RCW, respondent elected a formal hearing. The matter was officially reported by Gene Barker and Associates.

Respondent public agency appeared and was represented by its attorney, Keith D. McGoffin. McFarland Wrecking Corporation was represented by Kay Brossard, Attorney at Law.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties the Board makes these

FINDINGS OF FACT

I

The Puget Sound Air Pollution Control Agency (PSAPCA) is an activated air pollution control authority under terms of the state's Clean Air Act, empowered to monitor and enforce emissions standards for hazardous air pollutants, including work practices for asbestos removal.

PSAPCA has filed with the Board certified copies of its Regulations 1 and 2, of which we take official notice.

II

McFarland Wrecking Corporation is a demolition contractor located in Seattle, Washington which has been in business since 1949. They specialize in demolition of commercial buildings. This particular case involves asbestos removal on a demolition project consisting of several warehouses owned by the Frye Art Museum on 6th Avenue South in Seattle.

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III

On May 16, 1986, John McFarland, president of McFarland Wrecking Corporation, completed and filed with PSAPCA a notice of intent to remove and encapsulate asbestos at the demolition project. The notice advised of the proposed removal of an estimated 800 linear feet of asbestos from 70,000 square feet of building space. These figures were for the entire project consisting of several adjacent buildings. The notice stated that the project involved "warehouses" (plural), without more specificity as to the structures involved. The notice listed the project address as 1701 Sixth Avenue South in Seattle. In fact, the several buildings involved had separate street addresses in the 1700 series.

IV

In late May, asbestos removal from the warehouse at 1765 Sixth Avenue South was undertaken by an employee of McFarland Wrecking. This workman had previously received formal training as an asbestos remover and was certified as qualified to do such work. He also had had considerable practical experience in asbestos removal and disposal.

He stripped the asbestos from the boiler in the basement and then began removing insulation from pipes on the second floor. He used standard procedures wetting the material during removal and placing the removed material in leak-proof bags while wet. While working alone in the upstairs area on Sunday, June 1, 1986, he became ill.

1 The heat was intense in the closed-off space where he was working.
2 Unable to continue, he went home before finishing the job. Two of the
3 bags of asbestos debris were left unsealed.

4 V

5 The upstairs of the warehouse was closed off from the rest of the
6 building. The only means of entry to this space was by a single
7 stairway from the interior of the first floor. At the foot of the
8 stairs was a door secured by a dead bolt. The asbestos workman shut
9 this door and locked it before he left on June 1. He was the only
10 worker on the entire job site with access to the second floor area
11 where he had been working.

12 When the worker left, all second-floor windows opening to the
13 outside air were shut. However, he did not seal these windows nor the
14 door at the foot of the stairs to insure against the escape of any
15 asbestos fibers.

16 VI

17 On Monday, June 2, 1986, the asbestos workman did not get back to
18 the second floor of the warehouse where he'd gotten sick the previous
19 day. A PSAPCA inspector making preliminary surveillance of the
20 building that morning observed no asbestos removal in progress.

21 However, that evening, the PSAPCA inspector returned to the
22 warehouse with an inspector from the State Department of Labor and
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25

1 Industries and made observations in the boiler room and adjacent
2 areas. No inspection was attempted of the upstairs area of the
3 warehouse at that time.

4 VII

5 Sometime during the night of June 2, 1986, a person or persons
6 unknown broke the dead bolt off the interior stairway door and
7 forcibly gained entry to the second floor of the warehouse. The pump
8 spray can used for wetting asbestos was stolen from the work area.

9 Mr. McFarland later recovered the spray can from the operator of a
10 garage next door to the warehouse complex. The garage operator had
11 found it abandoned on nearby railroad tracks.

12 VIII

13 The following morning, Tuesday, June 3, 1986, the same agency
14 inspectors returned to the warehouse, found the door to the second
15 floor unsecured and climbed the stairs to look at the area. They
16 located the two unsealed bags filled with insulation debris. The
17 material inside did not appear to be wet. No moisture was visible in
18 the bags. No spraying can was on hand.

19 Two samples of debris from the bags were taken, both of which on
20 analysis proved to be high in asbestos content. Neither sample when
21 collected felt wet.

22 In addition to the bagged debris, the inspectors observed a
23 dusting of insulation fragments on a work stool left out in the area.
24 The floor underneath the stool was clean.

25
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IX

After the inspectors' observations, the asbestos workman was located elsewhere on site, brought to the upstairs area of the warehouse, and interviewed about conditions there. He told them that he had, in fact, wetted all the insulation material while removing it and had placed it in the leak-proof bags while wet. He said he would normally have sealed all bags and cleaned his work stool before leaving, but that in this case he left in a hurry because he felt very sick and needed to get away.

X

Following the June 3, 1986 inspection, PSAPCA mailed five separate notices of violation to McFarland Wrecking for alleged violation of WAC 173-400-075 (Emission Standards for Sources Emitting Hazardous Air Pollutants) and Sections 10.03, 10.04 and 10.05 of PSAPCA Regulation I (Removal and Encapsulation of Asbestos Material).

Subsequent to receipt of the laboratory analysis of the samples taken, PSAPCA, on August 6, 1986, mailed to McFarland Wrecking a Notice and Order of Civil Penalty (No. 6481). The Notice assessed a penalty of \$1000 for the same five alleged violations which were listed separately on the earlier - issued notices of violation. The notice was received August 7, 1986. Feeling aggrieved by the penalty, the company filed an appeal with this Board, received September 5, 1986.

XI

John McFarland has been involved with asbestos removal standards and techniques since they were first developed. He has himself taken courses in methods of asbestos abatement and, along with the employee he has hired to do asbestos removal, has been certified as a qualified asbestos remover. He is intensely concerned that the asbestos work done in connection with his company's demolition jobs be performed carefully and properly. In order to promote this result, he prepares a written asbestos removal plan for each job, providing specific instructions to the asbestos workman. Such a plan was given to the workman before commencement of removal operations in the instant case and the two discussed the job beforehand.

The asbestos workman involved here is a man who takes considerable pride in the thoroughness and professionalism of his work. He testified with credible conviction about the care and caution he employs on the job.

XII

A large sign was posted on the project site before and during the demolition work which advised in bold print that four structures were to be demolished. The sign, required by the City of Seattle, gave the overall project address as 1701 Sixth Avenue South.

No evidence was presented which showed that PSAPCA's inspector had any difficulty in locating the asbestos removal sites on the project

1 or was misled in any way by the notice of intent filed by Mr.
2 McFarland.

3 XIII

4 The evidence presented by the parties dealt at some length, with
5 conditions in and around the warehouse boiler room at the time of
6 inspection. However, PSAPCA's inspector testified that none of the
7 specific violations asserted and penalties assessed here relate to the
8 boiler room. Accordingly, we have found it unnecessary to make
9 findings concerning the state of affairs in that location.

10 XIV

11 Any Conclusion of Law hereafter determined to a Finding of Fact is
12 hereby adopted as such.

13 From these Facts, the Board comes to these

14 CONCLUSIONS OF LAW

15 I

16 The Board has jurisdiction over these persons and these matters.
17 Chapters 70.94 and 43.21B RCW.

18 II

19 The Legislature of the State of Washington has identified
20 compliance with the federal clean air act as an explicit aim of the
21 state clean air act. RCW 70.94.011, RCW 70.94.510.

22 III

23 Pursuant to this and other legislative authority, the state
24 adopted WAC 173-400-075 (1) which provides:

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1 The emission standards for asbestos, benzene from fugitive
2 emission sources, beryllium, beryllium rocket motor firing
3 mercury and vinyl chloride promulgated by the United State
4 Environmental Protection Agency prior to October 1, 1984,
as contained in 40 CFR Part 61, are by this reference
adopted and incorporated herein.

5 From context it appears that the state regulation is designed to
6 incorporate the work practices mandated federally for handling these
7 substances.

8 In Article 10 of its Regulation I, PSAPCA has adopted its own
9 regulations on removal of asbestos which are closely patterned after
10 the federal/state regulations.

11 IV

12 The Notice and Order of Civil Penalty at issue cites no specifics
13 of the federal regulations incorporated by reference in WAC
14 173-400-075(1) which are alleged to have been violated. RCW 70.94.431
15 requires that violations be described "with reasonable
16 particularity." Lacking such particularity here, we must reverse as
17 to the purported violations of the State regulation.

18 V

19 However, noncompliance with five specified sections of PSAPCA
20 Regulation I are asserted for June 3, 1986, as follows:

21 1. Section 10.03(a): Failure to file with the Air Pollution
22 Control officer written notification of intent to remove or
23 encapsulate asbestos, accompanied by the appropriate notification
fee.

24 2. Section 10.04(b)(2)(1)(A): Failure to adequately wet
25 materials when being removed from a facility.

1 3. Section 10.04(b)(2)(iii)(A): Failure to adequately wet
2 asbestos materials that have been removed or stripped and to
ensure that they remain wet until collected for disposal.

3 4. Section 10.05(a)/(b)(1)(iv): Failure to adequately wet
4 asbestos materials that have been removed or stripped and, after
wetting, seal all asbestos-containing waste materials in
leak-tight containers, while wet.

5 5. Section 10.04(b)(2)(ii): Failure to adequately wet asbestos
6 materials when they are being stripped from facility components.

7 We will deal with each of the asserted violations separately in
8 the order listed in the Notice of Civil Penalty.

9 VI

10 We conclude there was no violation of the prior notification
11 requirements of Section 10.03(a). PSAPCA's position in this matter is
12 that the required notice is supposed to give the location of the
13 "facility," and that "facility" is defined in Section 10.02(1) as "a
14 structure, installation vessel or building" (emphasis added). From
15 this, the agency argues that a separate notice was required for each
16 individual building involved in the demolition project.

17 Under the facts here, such an interpretation would exalt form over
18 substance. The purpose of the notice requirement is to provide PSAPCA
19 with a general idea of the scope of a project, and with an adequate
20 identification of where and when it will go forward to allow the
21 agency's inspectors to locate and monitor the operation.

22 The notice of intent given in this case fulfilled these purposes.
23 PSAPCA was in no way hindered or misdirected by the notice.

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VII

Section 10.04(b)(2)(1)(A) requires that when a facility component is being removed in sections, any asbestos materials exposed during cutting or disjointing operations shall be "adequately wetted."

Section 10.02(a) defines "adequately wetted" as "sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions."

We are persuaded that any material which was removed in sections here was wetted while being removed. There was no evidence that dust emissions occurred during the cutting or disjointing and, therefore, no showing that the wetting carried out during removal was not "adequate." The result, we decide is that no violation of Section 10.04(b)(2)(1)(A) was proven.

VIII

Section 10.04(b)(2)(1)(A) states that asbestos materials that have been removed shall be "adequately wetted to ensure that they remain wet until they are collected for disposal."

"Collected for disposal" is also a defined term. It means "sealed in a leak-tight, labeled container while wet." Section 10.02(h).

Here asbestos materials were placed wet in two bags, which were not sealed before the workman left the scene. The material dried out before the bags were sealed. Thus, they did not remain wet until "collected for disposal." In addition, dry fragments we believe to

1 have been asbestos debris were found on the work stool. We conclude,
2 as a result, that a violation of Section 10.04(b)(2)(iii)(A) did
3 occur. See 49 Federal Register 13659 (April 5, 1984).

4 However, the purpose of the regulation is to prevent asbestos from
5 being emitted to the ambient air, i.e., the surrounding outside air.
6 There is no evidence that any release of asbestos fibers into the
7 outside air in fact, ever occurred. Moreover, the materials involved
8 in this case remained within a "controlled area." Such an area is, by
9 definition, one to which only certified asbestos workers have access.
10 Section 10.02(1) The breach of restricted access here was the result
11 of unlawful and forcible entry.

12 Under these circumstances, only those breaking and entering were
13 likely to be exposed to substantial danger from the failure to seal
14 two bags while the material was wet and the leaving of fragments on
15 the work bench.

16 Yet, while the second-floor of the warehouse was not readily
17 accessible, it was not so thoroughly sealed off from the outside world
18 as to eliminate all possibility of asbestos escaping. And, the
19 conditions giving rise to the violation were allowed to persist
20 without correction for a day and half before being discovered by
21 agency inspectors.

IX

Section 10.05 deals with the disposal of asbestos-containing material. Under this section, before transporting debris to a disposal site, the material is to be wetted and sealed in a leak-tight container while wet. Section 10.05(b)(1)(iv). To the extent this represents a separate requirement from that discussed in the preceding paragraph, it describes steps which can be taken just prior to removing the asbestos bags from the work space for transport. The idea, presumably, is to prevent emissions of fibers to the air should a bag be ruptured in transit. The need to comply with such a requirement had not yet arisen when PSAPCA's inspector visited the warehouse site.

We decide, then, that no failure to comply with Section 10.05(b)(1)(iv) as a separate requirement was demonstrated.

X

Finally, a separate violation of Section 10.04(b)(2)(11) was alleged. This imposes the same "adequate wetting" requirement during the stripping of materials from facility components as is imposed during the process of removing materials in sections.

We are unaware that any different wetting procedure was used for stripping than for removal in sections and were apprised of no dust emissions. Therefore, we use the same analysis as in Conclusion VII and decide that no violation of Section 10.04(b)(2)(11) was shown.

XI

In sum, we conclude that a case has been made for just one of the five violations alleged. As to that one violation, we are unconvinced under all the facts and circumstances that an immediate monetary sanction would serve the purposes of the statute.

We are mindful that the penalties at issue are civil in nature and that their principal purpose is not retribution, but the alteration of behavior. From the presentations made to the Board, it is clear that any specific consciousness-raising sought from the regulatory actions taken has been amply accomplished. Further, given the extraordinary facts, juxtaposing worker illness and forcible entry, little by way of general deterrence will result from the exaction of a fine at this time.

Therefore, we conclude that the Order set forth below is appropriate.

XII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these conclusions, the Board enters this

ORDER

The Notice and Order of Civil Penalty (No. 6481) is reversed as to all violations except that of Section 10.04(b)(2)(iii)(A). The penalty is abated to \$200, which amount is suspended and shall not become due and payable unless appellant violates Article 10 of PSAPCA's Regulation I within a year of the date of the Order.

DONE this 20th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD


LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Member


JUDITH A. BENDOR, Member